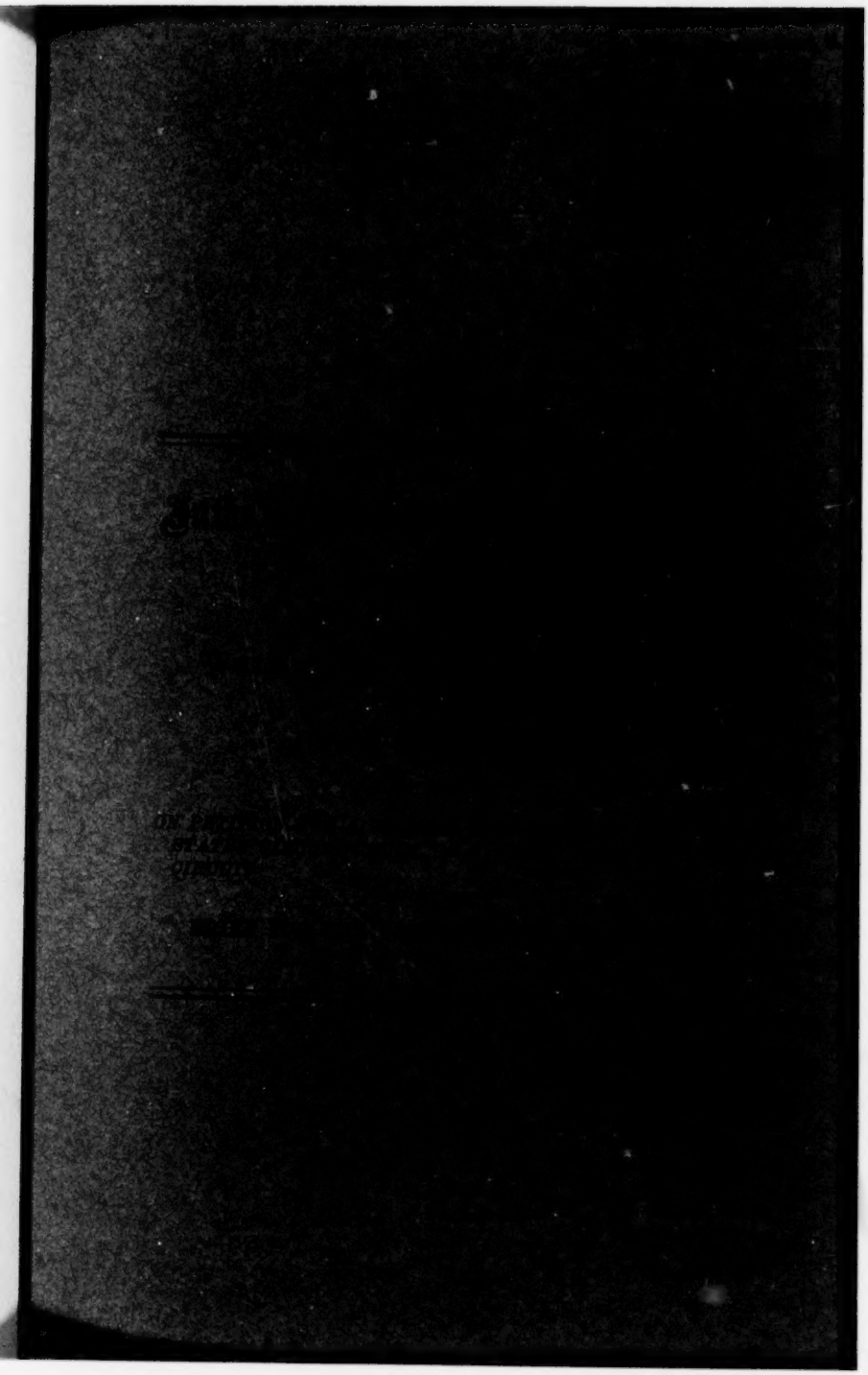

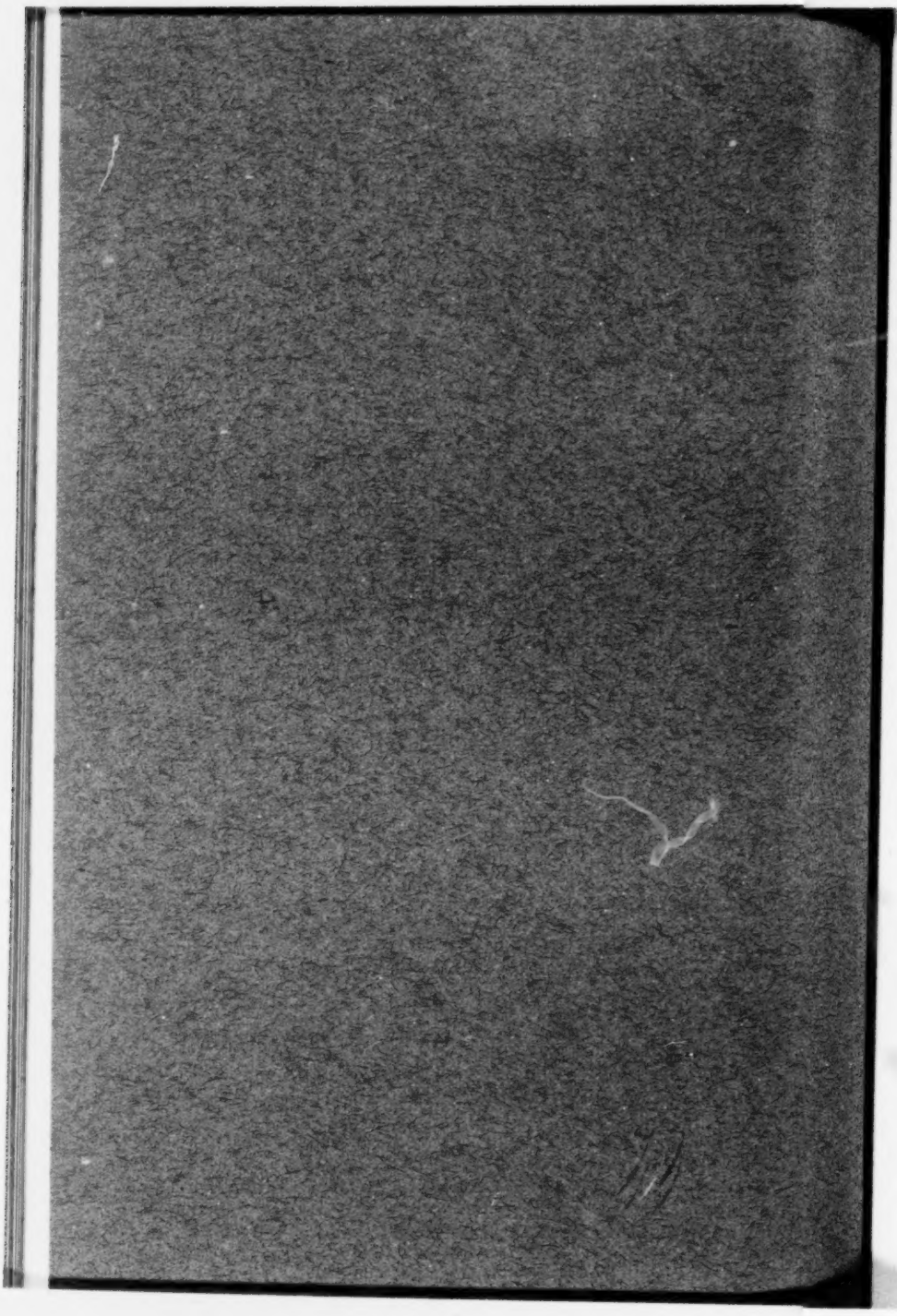

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 584

WILLIAM BERNARD WERNECKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 174–180) is reported at 138 F. (2d) 561.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 180) was entered November 5, 1943 (R. 180), and a petition for rehearing (R. 183–194) was denied December 2, 1943 (R. 203). The petition for a writ of certiorari was filed January 7, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules

XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the indictment charges offenses under Section 11 of the Selective Training and Service Act of 1940 with sufficient particularity.

2. Whether, in a prosecution for draft evasion by fraudulently pretending to become a minister, the Government may challenge as fraudulent a certificate of ordination issued by an incorporated religious society.

3. Whether it was prejudicial error to admit in evidence exhibits taken from petitioner's home at the time of his arrest where the facts which the exhibits were designed to prove were established by other evidence and admitted by petitioner when he took the stand.

4. Whether, on a charge of evading service in the military forces by falsely assuming to be a minister of religion, it was proper to admit in evidence as bearing on the question of petitioner's intent, statements made by petitioner prior to the enactment of the Selective Training and Service Act.

5. Whether the prosecutor was guilty of misconduct in referring in his summation to evidence tending to show that petitioner had National Socialist sympathies.

6. Whether the trial judge's statement to the jury at the conclusion of the evidence that he had

denied a motion for a directed verdict was prejudicial to petitioner.

7. Whether the trial judge's instruction to the jury that if they believed that any witness had testified falsely on any material issue they were at liberty to disregard the entire testimony of that witness was improper.

STATUTE INVOLVED

Section 11 of the Selective Training and Service Act of September 26, 1940, 54 Stat. 885, 894–895 (50 U. S. C. App. 311), provides in part as follows:

> Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this

> Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, * * * or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in execution of this Act or rules or regulations made pursuant to this Act, * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *.

STATEMENT

Petitioner was indicted in the District Court of the United States for the Northern District of Illinois on three counts charging violations of Section 11 of the Selective Training and Service Act of 1940, *supra*. The first count charged that on May 12, 1941, petitioner, being a person charged with the duty of complying with the Selective Training and Service Act and the regulations thereunder, unlawfully, knowingly, and wilfully failed to perform the duty required of him under the Act and the regulations to make true and correct answers in the questionnaire executed by him on May 12, 1941, and made false and untrue answers therein (R. 2–3). The third

count[1] charged that on April 27, 1941, petitioner unlawfully, knowingly, and wilfully evaded and attempted to evade service in the land or naval forces by falsely assuming and pretending to become a minister of religion (R. 4).

After a trial by jury petitioner was convicted on the first and third counts (R. 151). Motions for a new trial and in arrest of judgment (R. 152–157) were denied, and petitioner was sentenced to five years' imprisonment and to pay a fine of $10,000 on each count, the prison terms to run concurrently and payment of the fine on one count to discharge the fines on both (R. 158). The judgment was affirmed on appeal (R. 180).

The evidence for the Government may be summarized[2] as follows:

Petitioner filed his Selective Service questionnaire with his local draft board on May 12, 1941 (R. 11, 15). He stated that he lived on his mother's farm and assisted in managing her farm and other property; that his mother was dependent upon him for management of the property although not for financial support (R. 10, 12). In the section of the questionnaire calling for a statement of his education, petitioner stated that

[1] The second count was dismissed on the motion of the Government at the close of the Government's case (R. 52).

[2] The evidence is summarized because there is no complete statement thereof either in the opinion below or the petition for a writ of certiorari. Also, petitioner contends, in effect (Pet. 42–46), that there was no substantial evidence of guilt as to the third count.

he had attended Central Y. M. C. A. college for three years, Moody Bible Institute for one year, and Christian Ministry College for six months (R. 9). Under Series VIII (questions to be answered by ministers or students preparing for the ministry) he stated that he was a minister of the Allied Christian Management Army and customarily served as minister; that he had been ordained on April 27, 1941, by Frederick Simpson Brown; and that he was then attending the Moody Bible Institute and the Christian Ministry College in Chicago (R. 10). Petitioner also claimed exemption as a conscientious objector from either combatant or noncombatant military service by reason of his religious training and belief (R. 10–11). In the space provided for additional statements by the registrant, petitioner wrote (R. 11):

> I believe that my induction should be deferred according to law because I am an ordained minister and at present a theological student.

Petitioner also attached to his questionnaire the statements of two physicians setting forth that he had certain physical defects (R. 12–13).

On the basis of the information contained in the questionnaire, petitioner's local board classified him on May 13, 1941, in Class IV–D, the classification for ministers of religion and divinity students (R. 12, 14–16).

In July 1940, petitioner had told a friend that "We National Socialists will have to do something. * * * We must them find ways and means of preventing induction into the armed forces of this country of our brother National Socialists" (R. 47). He said that the National Socialists should organize a church, and become ministers in order to avoid induction into the armed forces (R. 47–48). In August and September 1940 he stated to the same person that he intended to organize a church (R. 48). Before that time, in 1938 and 1939, he had told two employees at his mother's farm that he, like Hitler, did not believe in religion (R. 50).

On November 1, 1940, shortly after he had registered in the first draft registration in October of that year (R. 84), petitioner paid the fee and obtained the material used in a correspondence course conducted by the Moody Bible Institute of Chicago (R. 30). At the time of trial in June 1943 he had returned to the school for grading only one of the 54 lessons which constituted the course (R. 30, 31, 32, 82). On March 24, 1941, several weeks prior to filling out his questionnaire, he filed with the Institute an application for admission to the day school in which he stated that he was a member of the Lutheran Church (R. 21). In connection with this application he submitted a physician's statement at-

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testing to his good health (R. 21–22). He was accepted as a student on April 23, 1941 (R. 22), but never enrolled or registered and never attended classes in the school (R. 20, 22, 25, 82).

The Christian Ministry College, of which petitioner in his questionnaire claimed to have been a student (R. 9), "existed only on paper" (R. 59–60; see also R. 33–34). Martin Carlson, 79-year old "dean" of the college, who testified in petitioner's behalf, stated that he had never functioned in such capacity (R. 52, 57, 59–60). One Louis De Vries, another witness for petitioner testified that he had attended classes at the college (R. 63), but admitted, on cross-examination, that he knew very little about the college (R. 64) and that he had previously testified before the grand jury that he "never saw anything of it" (R. 63).

The Allied Christian Management Army, the Christian Ministry College, the American Mutual Consumers Association and the American Rangers all maintained headquarters in the same small office in Chicago and were all headed by Paul Richter (R. 33, 37, 55–56, 60). The "Army" and the consumer cooperative plan were part of the same project (R. 55, 60, 65, 70). Petitioner testified on cross-examination that he joined the "Army" "within a period of a few weeks one way or the other either before or after registra-

tion for the draft" (R. 84). Frederick Simpson Brown, "Bishop" of the "Army," by whom petitioner claimed to have been ordained (R. 10), testified that he had never been ordained as a minister; that the title of Bishop was conferred on him by Richter against his will; that he had never participated in any ceremony whereby petitioner was ordained as a minister; and that he had signed petitioner's *ad interim* and final certificates of ordination at Richter's request (R. 33–38, see R. 72, 101–102). Martin Carlson, who also signed petitioner's final certificate of ordination (R. 101–102),[3] could not remember having been present at any ceremony whereby petitioner was ordained (R. 56–58). Petitioner preached one sermon before five or six people in the office which constituted the headquarters of the various organizations named above (R. 36, 55), and once delivered a speech or sermon at the LaSalle Hotel (R. 37, 70–71). On cross-examination, petitioner stated that he had been ordained by God when he was twenty-one years old, but could remember no place or no person to whom he had preached (R. 84).

ARGUMENT

1. There is no merit in petitioner's contention (Pet. 32–37) that both counts on which he was convicted are fatally defective for vagueness and

[3] This certificate was not issued until after the filing of petitioner's questionnaire.

failure to inform him of the offenses charged.[4] The first count (R. 2–3) describes an offense within the language of the statute, i. e., failure to perform a duty required under the Selective Training and Service Act and the regulations thereunder, and it specifies the duty violated as being the duty to give true answers in the questionnaire filed by petitioner with his local board on May 12, 1942; it also specifically alleges that he made false and untrue answers to the questions contained in the questionnaire. Similarly, the third count (R. 4) charges in the terms of the statute the offense of evading service in the land or naval forces, and describes the date and means used as falsely assuming on April 27, 1941, to become a minister of religion.[5] The in-

[4] It should be pointed out that, as the Circuit Court of Appeals said (R. 175):

"No motion to quash or for a bill of particulars or a demurrer was filed by the defendant. At the conclusion of the Government's evidence, the defendant filed a motion for a directed verdict and also motions to strike each count of the indictment, but gave no reasons for the motions to strike."

Additionally, the question of the sufficiency of the indictment was not, specifically at least, raised in either of petitioner's motions for a new trial and in arrest of judgment (R. 141–146) or in his assignments of error filed in the trial court. (R. 160–162, 165–167.) The question is, however, considered in the opinion of the Circuit Court of Appeals (R. 175–176).

[5] Petitioner correctly states (Pet. 33) that Section 11 of the Act (*supra*, pp. 3–4) does not denounce an attempt to evade service, as the third count also alleges (R. 4). In his charge to the jury, however, the judge instructed that to convict they must find that petitioner evaded service, thus eliminating attempt as a ground for conviction (R. 135–136).

dictment, therefore, meets the tests by which its validity must be judged; it informs petitioner of the nature of the offense and protects him against further prosecutions for the same offenses. *Hagner* v. *United States,* 285 U. S. 427, 431–433; *Lamar* v. *United States,* 241 U. S. 103, 116; *Bersio* v. *United States,* 124 F. (2d) 310, 314 (C. C. A. 4), certiorari denied, 316 U. S. 665; *United States* v. *Goldsmith,* 108 F. (2d) 917, 920–921 (C. C. A. 2), certiorari denied, 309 U. S. 678. The details of the offenses which petitioner now contends should have been alleged (Pet. 33–34) could have been sought by a motion for a bill of particulars. *Glasser* v. *United States,* 315 U. S. 60, 66; *United States* v. *Polakoff,* 112 F. (2d) 888, 890 (C. C. A. 2), certiorari denied, 311 U. S. 653. Having failed to make such a motion before trial, petitioner is in no position to rely upon his motions to strike at the close of the government's case (R. 52)[6] in support of his contention that he was prejudiced by the failure of the indictment to describe in greater detail the means used in committing the offenses. *Dunbar* v. *United States,* 156 U. S. 185, 192; *Keys* v. *United States,* 126 F. (2d) 181, 184 (C. C. A. 8), certiorari denied, 316 U. S. 694; *Capone* v. *United States,* 56 F. (2d) 927, 931 (C. C. A. 7), certiorari denied, 286 U. S. 553.

[6] These motions did not assert any ground for the action sought. See footnote 4, *supra*, p. 10.

2. Petitioner argues (Pet. 37–46) that since the Allied Christian Management Army was a duly organized religious corporation, the Government could not challenge its certification of petitioner as a minister. This contention relates to petitioner's conviction under the third count charging evasion of service by falsely assuming to be a minister. However, since the undisputed evidence in respect of petitioner's attendance and study at the Moody Bible Institute is alone sufficient to support his conviction under the first count for making false statements in his questionnaire (see Statement, pp. 4, 7–8, *supra*), and since the sentences under the two counts are concurrent (p. 5, *supra*), it is unnecessary to consider this contention. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105, and cases cited.[7] In any event, we think it is clear that just as a draft board is not bound by a religious sect's fiat that certain of its members are ministers,[8] the Government may

[7] Assuming that petitioner was exempt from service because of his claimed ministerial status, it is clear that this does not permit him to say that a false answer in respect of another claim for exemption is without influence or unimportant when made knowingly and with intent to mislead. *Kay* v. *United States*, 303 U. S. 1, 5–6; see also *Arnold* v. *United States*, 320 U. S. 212 (certiorari denied). Indeed, in this very case the evidence shows that upon the basis of his questionnaire petitioner was classified as exempt from service not only as a minister but as a divinity student (*supra*, p. 6).

[8] *Seele* v. *United States*, 133 F. (2d) 1015, 1021 (C. C. A. 8); *Buttecali* v. *United States*, 130 F. (2d) 172, 174 (C. C. A. 5); *Rase* v. *United States*, 129 F. (2d) 204, 208 (C. C. A. 6).

show that a purported ordination of a person as a minister was not authentic but was merely a fraudulent device to evade service. The evidence was clearly sufficient to justify the jury in finding that petitioner was never actually ordained; that he never intended to become and never actually served as a minister of religion; and that his certificate of ordination was spurious. His conviction under the third count was therefore proper.

3. Petitioner contends (Pet. 51–58) that Government Exhibits 17 and 18 should have been excluded on the ground that they were taken from his home as the result of an illegal search. The exhibits consisted of 53 manila envelopes and 147 sheets of blank ruled paper intended for use in answering the Moody Bible Institute correspondence school lessons (R. 45). The only fact which this evidence tended to prove was that petitioner did not return to the school 53 of the 54 lessons of his correspondence school course. This fact had previously been established by other evidence (R. 31, 32), and was later admitted by petitioner himself on cross-examination (R. 82). Hence, assuming that the question was properly preserved,[9] the admission of the exhibits, even if erroneous, was not prejudicial and does not constitute reversible error. *Edmondson* v. *United*

[9] See the discussion in the opinion below at R. 176–177, but cf. R. 66–67.

States, 80 F. (2d) 517, 518 (C. C. A. 5); *Dunlap* v. *United States,* 70 F. (2d) 35, 38 (C. C. A. 7), certiorari denied, 292 U. S. 653; *Kubik* v. *United States,* 53 F. (2d) 763, 766 (C. C. A. 8); *White* v. *United States,* 16 F. (2d) 870, 872 (C. C. A. 9), certiorari denied, 274 U. S. 745; *Libera* v. *United States,* 299 Fed. 300, 301 (C. C. A. 9); *Sharp* v. *United States,* 280 Fed. 86, 88 (C. C. A. 5), certiorari denied *sub nom Carollo* v. *United States,* 260 U. S. 730.

4. Petitioner argues (Pet. 38, 41, 58–59) that the court erred in permitting government's witness Irma Strope to testify that in 1938 and 1939 petitioner stated that he, like Hitler, did not believe in religion, and in allowing Raymond Healy to testify that in 1940 petitioner planned to organize a church as a means of preventing the induction of National Socialists into the armed forces (see Statement, *supra,* p. 7). Before Healy took the stand, the prosecutor announced that his testimony was to be restricted to the question of intent under the third count charging evasion of service (R. 46). And in his instructions to the jury, the trial judge charged that all testimony concerning statements made by petitioner prior to the dates set forth in the indictment was, if believed, to be considered by the jury only on the question of intent in relation to the charge of the third count (R. 135). So limited, the evidence was clearly admissible

as showing that petitioner's purpose in assuming to become a minister was to evade service as charged in that count. Cf. *Debs* v. *United States,* 249 U. S. 211, 215; *Williamson* v. *United States,* 207 U. S. 425, 451; *Allis* v. *United States,* 155 U. S. 117, 119; *Wood* v. *United States,* 16 Pet. 342, 360–361; *Viereck* v. *United States,* 130 F. (2d) 945, 959–960 (App. D. C.), reversed on other grounds, 318 U. S. 236; *United States* v. *Pelley,* 132 F. (2d) 170, 180–181 (C. C. A. 7), certiorari denied, 318 U. S. 764; *Schoborg* v. *United States,* 264 Fed. 1, 7 (C. C. A. 6), certiorari denied, 253 U. S. 494; *Herman* v. *United States,* 257 Fed. 601, 603–604 (C. C. A. 9), certiorari denied, 251 U. S. 558; *Coldwell* v. *United States,* 256 Fed. 805, 811–812 (C. C. A. 1), certiorari denied, 250 U. S. 661; *Kirchner* v. *United States,* 255 Fed. 301, 304–305 (C. C. A. 4), certiorari dismissed, 250 U. S. 678.[10]

5. Petitioner contends (Pet. 41, 50–51) that the prosecutor was guilty of prejudicial misconduct in referring in his summation to petitioner as a "disciple of Mr. Hitler" and to petitioner's association with the German-American Bund and the Aryan Book Store (R. 124). Petitioner's National Socialist sympathies and his attitude toward Hitler were first mentioned by government witnesses Healy and Strope, whose testi-

[10] Moreover, as has been pointed out (*supra,* p. 12), petitioner's conviction may be sustained on the basis of the first count alone.

mony in that regard was, as we have shown (*supra,* pp. 14–15), properly admitted. When petitioner took the stand in his own behalf he stated on direct examination that he had never been a member of the National Socialist party (R. 78). On cross-examination he denied membership in the German-American Bund, but admitted that he had taken "care of" the Aryan Book Store (R. 79, 80). He was then shown and admitted writing a letter addressed to Mr. Talpey of the Pelley Publishing Company inquiring whether, if he were a member of the Bund, he could join the Silver Shirts (R. 80–81). Petitioner's attorney in his summation argued to the jury that petitioner was not a Bund member and also argued that petitioner's testimony to the effect that he felt that he had been ordained by God was worthy of belief (R. 115, 118). In rebuttal, the prosecutor called the jury's attention to the fact that Mrs. Strope had testified that in 1939 petitioner had stated that he did not believe in religion because Hitler did not believe in it (R. 123–124). The prosecutor then asked the rhetorical questions, copied in the petition for writ of certiorari, of which petitioner complains (Pet. 50) concerning petitioner's National Socialist sympathies (R. 124). Read in the light of this context, the prosecutor's statements constituted legitimate rebuttal and were based directly upon evidence. *United States* v. *Socony-Vacuum Oil Company,*

310 U. S. 150, 241–242; *United States* v. *Skidmore,* 123 F. (2d) 604, 610 (C. C. A. 7), certiorari denied, 315 U. S. 800; *Baker* v. *United States,* 115 F. (2d) 533, 544 (C. C. A. 8), certiorari denied, 312 U. S. 692; *Comeriato* v. *United States,* 58 F. (2d) 557, 558 (C. C. A. 4), certiorari denied, 286 U. S. 566; *Rice* v. *United States,* 35 F. (2d) 689, 695 (C. C. A. 2), certiorari denied, 281 U. S. 730.

6. Petitioner also claims prejudice (Pet. 42, 48–49) because the trial judge, in dismissing the jury for the night, after argument of counsel had been completed, informed the jury that he had denied defense counsel's motion for a directed verdict (R. 128). In his charge the next morning the judge instructed the jury that, if he had at any time expressed an opinion on a matter of fact, it was their duty to disregard it; that they were the sole judges of the facts and of the credibility and weight to be given to the testimony of the witnesses (R. 129–130). Under these circumstances, the judge's remark that he had overruled the motion for a directed verdict, even if it be considered an expression of his opinion as to petitioner's guilt, would not constitute grounds for reversal. *Henry* v. *United States,* 273 Fed. 330, 336 (App. D. C.), certiorari denied, 257 U. S. 640; cf. *United States* v. *Murdock,* 290 U. S. 389, 394; *Quercia* v. *United States,* 289 U. S. 466, 469; *Horning* v. *District of Columbia,* 254 U. S. 135, 138, 139; *Allis* v. *United States,* 155 U. S. 117, 123;

Simmons v. *United States,* 142 U. S. 148, 155; *United States* v. *Goldstein,* 120 F. (2d) 485, 491 (C. C. A. 2), affirmed, 316 U. S. 114; *Marino* v. *United States,* 91 F. (2d) 691, 699 (C. C. A. 9), certiorari denied *sub nom. Gullo* v. *United States,* 302 U. S. 764.

7. Finally, petitioner complains (Pet. 46–47) of the trial judge's instruction that, if the jury believed that any witness had testified falsely to any material issue, they were at liberty to disregard the entire testimony of such witness. He argues that the instruction had the effect of submitting to the jury the determination of a question of law, i. e., the material issues in the case. However, the judge carefully defined the issues and admonished the jury to confine their deliberations to the questions submitted to them (R. 134, 136–137). Since the jury was left in no doubt as to what constituted the material issues in the case, the instruction complained of was proper. Similar instructions have been upheld in federal cases. *Mason* v. *United States,* 95 F. (2d) 612, 614 (C. C. A. 5); *Gordon* v. *United States,* 289 Fed. 552, 555 (App. D. C.); *Henry* v. *United States,* 273 Fed. 330, 338 (App. D. C.), certiorari denied, 257 U. S. 640.

CONCLUSION

The decision below is correct and the case presents no conflict of decisions or question of gen-

eral importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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